No. 89-65

In the Supreme Court of the United States

OCTOBER TERM, 1989

FORT STEWART SCHOOLS, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
FORT STEWART ASSOCIATION OF EDUCATORS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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QUESTIONS PRESENTED

1. Whether compensation of federal employees whose rates of compensation are not specifically provided for by law is a negotiable "condition[] of employment" under 5 U.S.C. 7103(a)(14), which defines that term as "personnel policies, practices, and matters * * * affecting working conditions."

2. Whether bargaining proposals concerning employee pay and money-related fringe benefits interfere with a federal agency's management right to determine its budget under 5 U.S.C. 7106(a)(1) where the agency has not shown that the proposals entail significant and unavoidable costs, or that the proposals' costs are not offset by compensating benefits.

3. Whether a Department of the Army regulation requiring, to the extent practicable, equality of salary schedules of Army dependents school and local school employees is a nondiscretionary implementation of a mandate of 20 U.S.C. 241, so that the Army regulation is supported by a "compelling need" under 5 U.S.C. 7117(b) and can therefore bar negotiations on a proposal contrary to the regulation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 860 F.2d 396. The decision of the Federal Labor Relations Authority (Pet. App. 31a-54a) is reported at 28 F.L.R.A. 547.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1988. A petition for rehearing was denied on February 17, 1989 (Pet. App. 55a-56a). On May 11, 1989, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including July 17, 1989. The petition for a writ of certiorari was filed on that date, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. 7101-7135; 20 U.S.C. 241; 5 C.F.R. 2424.11; and Army Reg. 352-3 are reproduced in the appendix to this brief (FLRA App. 1a-7a).

STATEMENT

A. Statutory Background

1. *The Federal Service Labor-Management Relations Statute*

Labor-management relations in the federal service are governed by the Federal Service Labor-Management Relations Statute (Statute), as amended, 5 U.S.C. 7101-7135. The Statute was enacted as Section 701 of the Civil Service Reform Act of 1978.[1] Under the Statute, the responsibilities of the Federal Labor Relations Authority (the Authority), a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating to matters arising under the Statute. 5 U.S.C. 7104-7105. The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its

[1] Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 Comp.). The Executive Order program was revised and continued by Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 Comp.), as amended by Exec. Orders 11,616, 11,636, and 11,838, 3 C.F.R. 605, 634, 957 (1971-1975 Comp.).

field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *Bureau of Alcohol, Tobacco and Firearms*, 464 U.S. at 97.

Under the Statute, a federal agency must bargain in good faith with exclusive bargaining representatives about unit employees' "conditions of employment." 5 U.S.C. 7103(a)(12). See also *Equal Employment Opportunity Comm'n* v. *FLRA*, 744 F.2d 842, 850 n.18 (D.C. Cir. 1984), cert. dismissed, 476 U.S. 19 (1986) ("conditions of employment" under Section 7103(a)(14) of the Statute to be construed broadly, to include the working situation and employment relations of bargaining unit employees). The term "conditions of employment" is defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * *" except to the extent, among other things, that a matter is "specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language which would bring about an inconsistency with a federal law, government-wide rule or regulation, or an agency regulation for which a "compelling need" exists. 5 U.S.C. 7117(a); *FLRA* v. *Aberdeen Proving Ground, Dep't of the Army*, 108 S. Ct. 1261, 1262 (1988). Section 7117(a)(2) of the Statute directs the Authority to formulate criteria for when an agency regulation is supported by a compelling need. One such criterion, relevant here, is whether an agency regulation is a nondiscretionary implementation of a statutory mandate. 5 C.F.R. 2424.11.

The Statute also contains a management rights clause that removes the exercise of certain management authority from the scope of negotiations. 5 U.S.C. 7106. As here pertinent, the Statute reserves

as nonnegotiable, subject to subsection (b) of Section 7106, the authority of management "to determine the * * * budget." 5 U.S.C. 7106(a)(1).

Additionally, although strikes in the federal sector are forbidden under 5 U.S.C. 7116(b)(7), Congress established a Federal Service Impasses Panel (FSIP or Panel). The Panel is made up of at least seven presidential appointees, and is charged with the responsibility of settling bargaining impasses. Either party may request the Panel to conduct an inquiry into a bargaining impasse. If, after the Panel makes initial recommendations to the parties they still cannot reach a settlement, the Panel may take various actions, including "whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse." 5 U.S.C. 7119(c)(5)(B)(iii). See generally 5 C.F.R. 2471.1 to 2471.12. When the Panel imposes a term on the parties it is "binding on such parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. 7119(c)(5)(C).

In the instant case, the Authority adjudicated a dispute over whether collective bargaining proposals were within the duty to bargain established by the Statute. 5 U.S.C. 7105(a)(2)(E), 7117(c). Under the Statute, if a federal agency alleges that a bargaining proposal is outside the duty to bargain, the exclusive representative may appeal the agency's allegation of nonnegotiability to the Authority. 5 U.S.C. 7117(c). The Authority examines the disputed proposal based on the record presented to it by the parties. *National Federation of Federal Employees, Local 1167* v. *FLRA*, 681 F.2d 886, 891 (D.C. Cir. 1982). If the Authority finds the proposal within the duty to bargain, the Authority orders that the agency upon request, or as otherwise agreed to by the parties, bargain over the proposal. 5 C.F.R. 2424.10. The

bargaining obligation imposed by the Statute does not require the agency to agree to the proposal or to make a concession. 5 U.S.C. 7103(a)(12); *Dep't of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

2. *20 U.S.C. 241*

Title 20 U.S.C. 241 authorizes the operation by federal agencies of schools in the United States which provide a free public education for eligible dependent children of military and civilian personnel who reside on federal property. Section 241 derives from Section 6 of the Act of Sept. 30, 1950, Title I of ch. 1124, 64 Stat. 1107, accordingly dubbing these schools frequently as "Section 6 schools." For most federal employees Congress sets specific wage and salary scales and classifications. However, Congress has not established specific wage and salary scales for dependent school employees. Title 20 U.S.C. 241(a) provides that "personnel may be employed and the compensation, tenure, leave, hours of work and other incidents of the employment relationship *may be fixed without regard to the Civil Service Act and rules* * * *" and other specified portions of Title 5 of the U.S. Code (emphasis added).

Title 20 U.S.C. 241(a) also requires the dependents schools to ensure "to the maximum extent practicable" that education at its schools is "comparable to free public education provided for children in comparable communities in the State." Dependents schools must also comply with 20 U.S.C. 241(e), which provides that "to the maximum extent practicable" total payments for such education shall be limited to an amount per pupil that does not exceed the amount spent in comparable communities in the state where the dependents school is located.

B. Proceedings in the Present Case

1. *The Authority's Decision*

This case arose during the course of collective bargaining negotiations between the Fort Stewart (Georgia) Association of Educators ("FSAE" or "union") and the Fort Stewart Schools ("Schools" or "Army") (Pet. App. 2a). Fort Stewart Schools is one of the 18 dependents school systems established under 20 U.S.C. 241 (Pet. App. 2a). The union represents all professional and nonprofessional employees at the Schools (Pet. App. 2a).

During negotiations, the Schools objected to three bargaining proposals concerning salary and benefits presented by the union for bargaining (Pet. App. 2a).[2] The first proposal included sections which set mileage reimbursement, mandated certain insurance programs, and gave the union the right to review and comment on salary schedules (Pet. App. 31a-34a). The second proposal suggested a fixed salary increase of 13.5% for the teachers and other employees for the subsequent school year (Pet. App. 34a). The third proposal detailed various leave practices such as personal leave, sick leave, professional leave, maternity leave, and leave without pay (Pet. App. 48a-54a). The Authority concluded that most of proposal 1; all of proposal 2; and most of proposal 3 were within the agency's duty to bargain (Pet. App. 45a).

a. First, the Authority (Chairman Calhoun dissenting in part) determined that the agency had not supported its argument that the union's proposals do not concern conditions of employment (Pet. App. 35a). The Authority stated (Pet. App. 35a) that it

[2] The text of union proposals 1, 2, and 3 is appended to the certiorari petition (Pet. App. 31a-34a, 48a-54a) filed by the Schools in this case.

had consistently held that nothing in the Statute or its legislative history prevents bargaining over employee compensation insofar as (1) the matters proposed are not specifically provided for by law and are within the discretion of the agency; and (2) the proposals involved are not otherwise inconsistent with law, applicable Government-wide rule or regulation, or an agency regulation for which a compelling need exists. The Authority cited (Pet. App. 35a), in support of its decision, *American Federation of Government Employees, AFL-CIO, Local 1897 and Dep't of the Air Force, Eglin Air Force Base, Florida*, 24 F.L.R.A. 377 (1986) (*Eglin*) (Chairman Calhoun dissenting).[3]

The Authority stated that it had previously held that nothing in 20 U.S.C. 241 or its legislative history indicated that Congress intended to restrict an agency's discretion concerning the particular employment practices relating to compensation which could be adopted (Pet. App. 36a). The Authority cited (Pet. App. 36a), in support of its decision, *Fort Knox Teachers Ass'n and Fort Knox Dependent Schools*, 26 F.L.R.A. 934 (1987) (*Fort Knox Dependent Schools*) (Chairman Calhoun dissenting), petition for review

[3] In *Eglin*, the Authority's lead decision in this area, the Authority found negotiable a proposal that a Nonappropriated Fund Instrumentality (NAFI) absorb 75% of the cost of health insurance. Health insurance for NAFI employees is not governed by law. After surveying the general scheme for setting pay and fringe benefits for federal employees, the scope of bargaining under the Statute, and rulings by the Federal Labor Relations Council under E.O. 11,491, as amended, 3 C.F.R. 861 (1966-1970 Comp.) (24 F.L.R.A. at 378-381), the Authority concluded that Congress intended wages and fringe benefits to be considered the same for negotiability purposes as other conditions of employment under the Statute.

filed *sub nom. Fort Knox Dependent Schools* v. *FLRA*, Nos. 87-3593/87-3742 (6th Cir. June 25, 1987).

In *Fort Knox Dependent Schools*, 26 F.L.R.A. at 935-38, the Authority found a proposal concerning sabbatical leave, similar to a portion of proposal 3 here at issue, did not conflict with Section 241. The Authority in *Fort Knox Dependent Schools*, 26 F.L.R.A. at 937, rejected arguments that a proposal would conflict with the cost limitation provisions of 20 U.S.C. 241(e) simply by causing increased costs in a particular area of personnel compensation such as leave. Such an increase, the Authority held in *Fort Knox Dependent Schools*, 26 F.L.R.A. at 937, would not necessarily cause the agency to exceed the limitations on total per pupil cost of providing an education, noting that compensation is only one aspect of total cost.[4]

b. Second, the Authority in the instant case rejected the Army's claim that the proposals interfered with the Army's right to determine its budget under Section 7106(a)(1) of the Statute (Pet. App. 36a-37a). The Authority stated its long standing principle that in order to demonstrate that a union proposal directly interferes with management's right to determine its budget under Section 7106(a)(1), it is necessary for the agency either to show that the proposal prescribes the programs and operations to be included in the agency's budget or the amount to be allocated for them; or to make a substantial demonstration that the anticipated increase in costs is significant and unavoidable and is not offset by compensating benefits (Pet. App. 36a).

[4] The Authority in the instant case also noted (Pet. App. 36a) that regardless of the correctness of the Army's position on the negotiability of pay matters, sections A, C, and D of proposal 1 would be negotiable because they only involve union comments on pay data.

The Authority stated that the Army had not made a substantial demonstration that implementation of the proposals would result in a significant, unavoidable increase in costs not offset by compensating benefits (Pet. App. 37a). The Authority indicated that the record failed to show how many employees would actually be affected by the proposals, or the monetary increase which would be directly attributable to implementation of the proposals in the subject bargaining unit or in other bargaining units within the system (Pet. App. 37a).

The Authority also determined that the Army had failed to show that any increased costs occasioned by the proposals would not be offset by compensating benefits (Pet. App. 37a). Finally, the Authority noted that while the consequences of a proposal may be considered in the collective bargaining process, if concerns such as agency cost prevented the parties from reaching agreement, that consideration could be presented to the Federal Service Impasses Panel pursuant to Section 7119 of the Statute (Pet. App. 38a).

c. Finally, the Authority turned to the Army's assertion that the proposals conflict with the Army's regulation, AR 352-3, § 1-7, for which the Army alleged a "compelling need" exists (Pet. App. 40a-41a). The Authority pointed out (Pet. App. 40a-41a) that substantially the same argument was raised by a Section 6 school to support its claim that there was a compelling need for AR 352-3 in *Fort Knox Teachers Ass'n and Board of Education of the Fort Knox Dependents Schools*, 27 F.L.R.A. 203 (1987), petition for review filed *sub nom. Board of Education of the Fort Knox Dependents Schools* v. *FLRA*, Nos. 87-3702/87-3853 (6th Cir. July 24,

1987) (*Fort Knox Teachers Ass'n*). In that case the Authority found "nothing in either the law [Section 241] or its legislative history which persuades [the Authority] that Congress intended to restrict the Agency's discretion as to the particular employment practices which could be adopted" (Pet. App. 41a) (bracketed material added). *Fort Knox Teachers Ass'n*, 27 F.L.R.A. at 216. Consequently, the Authority held in the instant case that the agency failed to sustain its burden of showing a compelling need for the regulation (Pet. App. 41a). Moreover, the Authority stated in the instant case, even assuming the Army had supported its compelling need argument, the agency had not shown how several portions of proposal 1, which assume that pay rates will be fixed in accordance with pay practices in comparable school systems, conflicted with the Army's regulation (Pet. App. 41a).

2. *The Court of Appeals Decision*

Fort Stewart Schools petitioned the Eleventh Circuit to review the Authority's decision (Pet. App. 1a). A unanimous panel of the Eleventh Circuit affirmed and enforced the Authority's decision and order (Pet. App. 1a-30a).

a. First, the court of appeals determined that the Army had a statutory duty to bargain because the union's proposals involve "conditions of employment" within the Army's discretion to establish (Pet. App. 6a-17a). The court of appeals indicated that the Authority had determined in prior decisions that the Statute did not prohibit bargaining over compensation and fringe benefits when "Congress has not specifically provided for these matters; and the proposals do not conflict with law, government-wide rule or regulation, or an agency regulation for which a compelling need exists" (Pet. App. 7a; citation

omitted). The court of appeals determined that the Statute and its legislative history supported the Authority's conclusion (Pet. App. 7a). The court of appeals explained that the Statute's definition of "conditions of employment" does not exclude compensation and fringe benefits (Pet. App. 7a).

The court rejected the Army's argument that the definition of "conditions of employment" in the Statute encompasses a narrower range of bargainable matter than under Section 8(d) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(d),[5] because the Statute does not specifically list wages and hours as bargainable matters (Pet. App. 8a). The court found that the absence of such terms did not prove Congress intended to exclude "wages" and "hours" from negotiation (Pet. App. 8a). Rather, the court explained that Congress' use of the word "other" in Section 8(d) shows that Congress considered wages and hours to be conditions of employment (Pet. App. 8a). In the Statute, the court stated, Congress simply used the general term "conditions of employment," which encompasses wages, to define the scope of negotiable matters (Pet. App. 8a).

The court also rejected the Army's argument that Section 704 of the Civil Service Reform Act of 1978, 5 U.S.C. 5343 note, indicates congressional intent against permitting bargaining on wages for federal employees not covered by a provision like Section 704 (Pet. App. 8a). That section authorizes certain groups of federal prevailing rate employees to negotiate on, among other things, pay matters. The court found that the legislative history of Section 704 indicates that the section was intended to continue an

[5] Section 8(d) of the NLRA states in relevant part that "wages, hours, and other terms and conditions of employment" are subject to bargaining in the private sector.

exclusion of certain employees from the Prevailing Rate Systems Act of 1972, Pub. L. No. 92-392, 86 Stat. 564 (codified at 5 U.S.C. 5341-5349), which Act would have made the employees' pay nonnegotiable by specifically providing for their pay in the absence of Section 704 (Pet. App. 8a-9a).

Turning to the legislative history of the Statute, the court agreed with the Authority and the Second Circuit in *West Point Elementary School Teachers Ass'n* v. *FLRA*, 855 F.2d 936, 939-40 (2d Cir. 1988) (*West Point*), that legislators' remarks during debate on the Statute concerning negotiation on wages reflected an intent to bar negotiation only insofar as wage matters were regulated by Congress in legislation (Pet. App. 9a-13a).

The court also agreed with the Authority and the Second Circuit that the proposals were not inconsistent with 20 U.S.C. 241 (Pet. App. 13a). The court determined that the language of Section 241 does not specifically provide for the wages of school employees; nor does that section require identical salaries between dependents schools and local schools (Pet. App. 13a-16a).

b. Next, the court concluded the Army had not established a compelling need for its regulation that mandates equality of compensation between employees in dependents and local schools (Pet. App. 17a-19a). The court agreed with the Authority and the Second Circuit that the Army regulation does not "implement a mandate to the Army since Section 241 does not require the Army to compensate its school employees according to local public school practices" (Pet. App. 18a). As the Second Circuit had concluded, 855 F.2d at 943, the court below determined that the regulation was not "essential" to the Army providing a comparable education at comparable cost (Pet. App. 18a). The court found that the Army

could achieve both of these goals notwithstanding large variations in the employees' wages because many expenses beyond their salaries enter into the calculation of per pupil expenditures (Pet. App. 18a-19a). Moreover, the court stated Section 241 requires equality only to the maximum extent possible, not exact equality (Pet. App. 19a).

c. Finally, the court agreed with and deferred to the Authority's conclusion that the union's proposals did not interfere with the Army's right to determine its own budget (Pet. App. 19a-20a), as had the Second Circuit concerning similar proposals in *West Point*, 855 F.2d at 943-44. The court agreed with the Authority that the Army had not demonstrated that the proposals would cause substantial and unavoidable cost increases (Pet. App. 20a). The Army did not specify any amount by which the proposed matters would increase its budget (Pet. App. 20a). Further, the court found that the Army did not establish that no compensating benefits would offset such costs even if its costs increased under the proposals (Pet. App. 20a).

SUMMARY OF ARGUMENT

1. The Statute establishes its scope of bargainable subjects by first identifying three broad classes of matters ("personnel policies," "practices," and "matters * * * affecting working conditions") comprising the substantive definition of "conditions of employment." 5 U.S.C. 7103(a)(14). Several specific exceptions, none of which involves pay, then remove certain matters from the definition. Congress intended one of these specific exceptions, matters "specifically provided for by Federal statute," to remove compensation from the definition of "conditions of employment" for the overwhelming majority of federal employees, as Congress sets specific pay rates and benefits for most employees. However,

for a relatively few federal employees like those in this case, whose compensation is not fixed by law, compensation is negotiable as a "condition[] of employment" because compensation fits within any one or all three of the broad classes of matters comprising the definition of that term.

The substantive definition of "conditions of employment" is thus far broader than just the physical aspects of the work place. To so limit the definition would render nonnegotiable many matters, like promotion procedures and disciplinary rules, that are firmly established as proper bargaining subjects under the Statute. Moreover, express identification of compensation as a bargainable matter in other laws in no way undermines the conclusion that compensation fits within the Statute's broad substantive definition of "conditions of employment." The Statute does not list any specific bargaining subjects; and these other laws generally identify wages as a particular category of "conditions of employment."

The Executive Orders governing federal sector labor relations before the Statute contained language concerning the scope of bargainable matters almost identical to Section 7103(a)(14). The principle that compensation is bargainable as a condition of employment unless it is set by law was expressly recognized under these Orders. Yet Congress, although clearly familiar with Executive Order practice, evidenced no dissatisfaction with that result. Remarks by some legislators in the Statute's legislative history that employee compensation would not be bargainable are not properly viewed as indicating an intent to make pay nonnegotiable *per se*. If that was congressional intent the language of the Statute should reflect it, but that is not the case. Instead, the Statute's language (Section 7103(a)(14)(C)) reflects what other remarks by legislators make clear: that compensation would be

withdrawn from the scope of bargainable matters only when Congress specifies compensation rates in law.

2. The Authority's test for determining when bargaining proposals involving monetary cost interfere with management's right to determine its budget under Section 7106(a)(1) fully protects management interests as intended by Congress under that right. In relevant part the test relieves management from bargaining if it can establish that the real cost impact of a proposal, after all its required outlays and benefits are considered, compels management to seek through the budget process more money to conduct a program than management has deemed necessary. Thus, the test recognizes that only those bargaining proposals involving cost that have the effect of requiring management to revise its budget needs should be barred from bargaining under the budget right. Mere cost of a proposal alone is an insufficient basis to find interference with the Statute's budget right.

The Schools in this case make no showing as to how much the subject proposals will cost, or how much those costs might be offset, if at all, by compensating benefits. Instead, they erroneously claim that the Authority injects itself into agency budget decisions. However, the Authority does not become involved in management decisionmaking protected by the budget right. The Authority properly inquires of an agency invoking the right whether a proposal would merely require the agency to redistribute existing funds within existing operations, or would compel the agency to obtain additional funds. Management is not exempt under the budget right from bargaining on union proposals simply because management wishes to spend existing funds to set conditions of employment that differ from the union's proposals. Moreover,

under the Schools' view the Authority would simply "rubber stamp" agency conclusions that proposals' costs are not offset by compensating benefits, a role obviously inappropriate to the Authority's responsibility to resolve negotiability disputes.

3. Under Authority rules promulgated at Congress' direction a "compelling need" exists for an agency regulation, enabling it to bar negotiation on inconsistent proposals, if among other things the regulation is a nondiscretionary implementation of a statutory mandate. 5 C.F.R. 2424.11(c). Army regulation 352-3, § 1-7, is not such a regulation. 20 U.S.C. 241 does not mandate the same compensation levels for Section 6 school employees as local school employees receive. Section 241 only requires the Schools as best they can to provide federal dependents with comparable education to local schools at the same cost as local schools. Accordingly, the Schools retain the discretion to set compensation as they wish, so long as the goals of Section 241 are met. The Army's regulation is thus an exercise of discretion, not statutory mandate.

ARGUMENT

I. COMPENSATION OF FEDERAL EMPLOYEES WHOSE RATES OF PAY AND BENEFITS ARE NOT PROVIDED FOR BY LAW IS A NEGOTIABLE "CONDITION[] OF EMPLOYMENT" UNDER 5 U.S.C. 7103(a)(14)

The Statute broadly defines "conditions of employment" subject to the bargaining obligation as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. 7103(a)(14); see also *Equal Employment Opportunity Comm'n* v. *FLRA*, 744 F.2d at 845; *Dep't of Defense* v. *FLRA*, 659 F.2d at 1143 n.2. As the court of appeals recognized

(Pet. App. 7a), "this definition alone does not exclude compensation and fringe benefits."

Rather, as the Schools recognize (Pet. Br. 6-7, 23) and the Authority has consistently acknowledged (see, *e.g.*, *Eglin*, 24 F.L.R.A. at 378), pay matters for most federal employees are removed from the substantive definition of "conditions of employment" by an exception which provides that the term does not include matters to the extent they are "specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14)(C).[6]

The wages and fringe benefits of most federal employees are outside federal agencies' duty to bargain because they are "specifically provided for" in various statutes providing for pay and benefits. See, *e.g.*, 5 U.S.C. 5331 *et seq.* (the General Schedule establishing pay rates for most federal white-collar employees). However, the broad substantive definition of "conditions of employment" in itself encompasses matters relating to pay and fringe benefits for those few federal employees whose pay is determined in the agency's discretion rather than by law, such as the dependents schools employees in the instant case.[7] Compensation is clearly one of the con-

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[6] Other exceptions to the substantive definition are matters relating to the classification of positions and political activities. 5 U.S.C. 7103(a)(14)(B) and (A). Compensation matters are not an enumerated exception to the definition.

[7] Of the "forty-odd federal pay systems which are not entirely set by statute" referenced in *Dep't of Defense Dependents School* v. *FLRA*, 863 F.2d 988, 989 (D.C. Cir. 1988), reh'g en banc granted (Feb. 6, 1989), employees under only a few of those systems would be able to negotiate on compensation under the Authority's case law. Most of these forty pay systems contain specific standards to be met by agencies in setting pay, thus removing pay determinations from the scope of negotiable agency discretion. See, *e.g.*, *American*

ditions on which the employment relationship is based. Indeed, compensation matters are probably the single most significant factor in attracting and retaining qualified employees. This construction of the Statute is supported by the plain meaning of the Statute's definition of "conditions of employment," as well as the Statute's antecedents and its legislative history. Moreover, the Authority is entitled to considerable deference in its interpretation of the Statute which it administers. Cf. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979).

1. When, as in this case, Congress defines a term for use in a law, that definition is "official and authoritative evidence of legislative intent," and prevails over all other interpretive aids. 1A Sutherland, *Statutory Construction* § 27.02 (4th ed. 1985); *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150-151 (1947). Accordingly, inquiry properly begins in this case with determining whether employee compensation is a "personnel polic[y]," "personnel practice[]," or "matter[] * * * affecting working conditions" under Section 7103(a)(14). If employee compensation can reasonably be said to fit under any one of these three categories, then the Authority and the court below are correct in their resolution of this issue.

Employee compensation manifestly fits within any one of these three categories of matters encompassing the statutory definition of "conditions of employment." Thus, the amount of pay and money-related fringe benefits an employer will provide to its em-

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***Federation of Government Employees and Dep't of Defense, Dep't of the Army and Air Force, Headquarters, Army and Air Force Exchange Service, Dallas, Texas*, 32 F.L.R.A. 591 (1988) (proposal to increase commission rates nonnegotiable for employees subject to the Prevailing Rate Systems Act).**

ployees for work performed certainly constitutes either a personnel policy or personnel practice, or both. *Roberts' Dictionary of Industrial Relations* 542 (3d ed. 1986) ("personnel policy" broadly defined as "[a]n organization's guiding principles with respect to employees," including "what actions are to be taken" by management as regards its employees).

At no point do the Schools deny that employee compensation is a personnel policy or personnel practice. Rather, their definitional argument focuses primarily on a portion of the definition, that is, whether compensation is a "matter * * * affecting working conditions," which they construe as involving only the physical surroundings of the work place (Pet. Br. 17).[8]

To begin with, the Schools' definitional argument suffers from an inconsistent premise. The Schools argue (Pet. Br. 17-20) that compensation *per se* is not included in the definition of "conditions of employment" as it is not a matter affecting working conditions. On the other hand, the Schools recognize (Pet. Br. 6, 23) that pay for most federal employees has been removed from the definition of "conditions of employment" by Section 7103(a)(14)(C), because for most employees pay is specifically provided for by law. However, Congress would not have needed the Section 7103(a)(14)(C) "specifically provided for" exclusion to make pay nonnegotiable if it thought that

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[8] Under a basic principle of statutory construction, the modifier "affecting working conditions" applies only to the immediate antecedent, "matters," in Section 7103(a)(14), not to "personnel policies" and "practices." *United States* v. *Ven-Fuel, Inc.*, 758 F.2d 741, 751 (1st Cir. 1985). The principle is especially appropriate here, since the open-ended term "matter" is in need of modification, while "personnel policies" and "practices" have independent meaning without the modifier.

pay matters were not within the broad substantive definition of "conditions of employment." The Schools' definitional argument therefore renders Section 7103(a)(14)(C) redundant as to pay matters, a result to be avoided. *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955).

The Schools' claim that compensation is not a "matter[] * * * affecting working conditions," because it does not concern the physical surroundings of the work place, is seriously flawed even without this contradictory premise. Pay certainly can affect working conditions. For example, various forms of pay, such as hazardous duty pay, incorporate compensation for unpleasant work surroundings. See, *e.g.*, Federal Personnel Manual, Supplement 532-1, Appendix J. Thus, management must trade off the amount it must pay to compensate employees for unpleasant work surroundings with the cost of eliminating the unpleasantness. If management must pay more to attract a qualified work force to endure unpleasant surroundings than it would to eliminate the unpleasant surroundings, presumably management would choose to eliminate the unpleasant surroundings as the most cost-effective measure.

Moreover, a construction of the term "conditions of employment" that is limited to the physical environment of the work place would drastically reduce the scope of bargaining under the Statute from what it currently is under established precedent. In *Equal Employment Opportunity Comm'n* v. *FLRA*, 744 F.2d at 850 n.18, the D.C. Circuit rejected the view that the phrase "conditions of employment" is to be viewed narrowly as encompassing only the physical surroundings of the work place. Rather, the court pointed out that it has consistently endorsed the Authority's "broad interpretation" of the phrase, to

include the working situation and employment relations of bargaining unit employees.

Matters not restricted to the physical conditions of the work environment have been found in a number of cases to be negotiable conditions of employment. *Dep't of Defense, Dep't of the Army* v. *FLRA*, 685 F.2d 641, 647 (D.C. Cir. 1982) (post exchange privileges are negotiable conditions of employment); *National Treasury Employees Union* v. *FLRA*, 793 F.2d 371 (D.C. Cir. 1986) (incentive pay is a proper subject for negotiations); *United States Naval Ordnance Station, Louisville, Kentucky* v. *FLRA*, 818 F.2d 545 (6th Cir. 1987) (reassignment among qualified employees by seniority is negotiable); *Dep't of the Air Force, U.S. Air Force Academy* v. *FLRA*, 717 F.2d 1314 (10th Cir. 1983) (stays of discipline until appeal process is over is negotiable).[9]

Perhaps recognizing that they cannot credibly contend that employee compensation fits none of the matters referenced in the Statute's definition of "conditions of employment," the Schools argue alternatively (Pet. Br. 17-20) that various other laws show that pay and fringe benefits are "terms," but not "conditions," of employment. This alternative argument is equally unavailing. Section 8(d) of the National Labor Relations Act (NLRA) provides for

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[9] While the specific question of whether the particular matter at issue was a condition of employment under Section 7103(a)(14) was not explicitly before the courts in all the cited cases, implicit in the determination that a matter is negotiable is that it concerns conditions of employment, since the obligation to bargain under the Statute extends only to conditions of employment. The D.C. Circuit cases cited in the text also call into question the validity of that court's holding in *Dep't of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988 (D.C. Cir. 1988), reh'g granted en banc (Feb. 6, 1989), heavily relied on by the Schools (Pet. Br. 17).

collective bargaining over "wages, hours, and other terms and conditions of employment." 29 U.S.C. 158 (d). The Schools argue (Pet. Br. 17-18) that because the Statute does not include reference to "terms" of employment, it implies a narrower range of bargainable matters under the Statute. However, in correctly rejecting this argument, the court below stated (Pet. App. 8a) that by using the word "other" in Section 8(d), Congress included wages and hours in the general category of "conditions of employment." Thus, Section 8(d) of the NLRA expressly relates "wages" to "conditions of employment." [10]

The court below also properly rejected petitioner's argument (Pet. Br. 19) that Section 704 of the Statute supports the view that pay is a "term," not a "condition" of employment under Section 7103(a)(14). As the court below correctly found (Pet. App. 8a-9a), Section 704 clarifies and extends the exemption from the pay-setting mechanisms of the Prevailing Rate Systems Act of 1972, 5 U.S.C. 5341 *et seq.*, for employees who had negotiated wages prior to implementation of that Act. Because the Prevailing Rate Systems Act establishes detailed procedures for

[10] Research discloses no court or National Labor Relations Board decision in the 54-year history of the NLRA which parses the relevant phrase in Section 8(d) between "terms" and "conditions" of employment. More importantly, the NLRA itself gives evidence that Congress did not have such a fine distinction in mind for Section 8(d). In Section 9(a) of the NLRA, 29 U.S.C. 159(a), Congress sets forth the rights of certified exclusive representatives "for the purposes of collective bargaining in respect to *rates of pay, wages*, hours of employment, *or other conditions of employment.*" (Emphasis added). The absence of coupling "conditions of employment" with the word "terms" in Section 9(a), which coupling is so critical to the Schools' NLRA analysis, is telling evidence that Congress did not consider "terms" of employment to be a distinct concept from "conditions" of employment.

fixing the pay rates of federal blue-collar employees, Sections 7103(a)(14)(C) and 7117(a)(1) of the Statute would preclude pay bargaining by all employees covered by the Prevailing Rate Act in the absence of an exemption. Section 704 acts as that exemption from the Statute's limitation on bargaining over matters which are specifically provided for by federal statute or which are inconsistent with law.

As the Schools recognize (Pet. Br. 18 n.9), there are some statutes which use the phrase "wages" in reference to "terms and conditions of employment," and those which use "wages" only in reference to "other conditions of employment." [11] The existence of various methods of referring to conditions of employment lends greater significance to the fact that a determination of whether wages fit within the definition of "conditions of employment" in Section 7103(a)(14) should be made solely with reference to the statutory definition itself. As demonstrated above, this definition indicates that compensation for federal employees whose pay is not specifically provided for by federal statute is a "condition of employment" within the meaning of Section 7103(a)(14)(C).[12]

[11] Senior Executive Service Act, 5 U.S.C. 3131(1) (providing for "a compensation system, including salaries, benefits, and incentives, and for other conditions of employment"); 18 U.S.C. 3622(c)(1) (providing for "the rates of pay and other conditions of employment" of prisoners on work-release); 16 U.S.C. 1703(a)(3) (providing that the Secretary of Interior and the Secretary of Agriculture shall determine "rates of pay, hours and other conditions of employment").

[12] Contrary to the Schools' claim (Pet. Br. 19), Congress' omission of an express reference to pay as a negotiable matter under the Statute, as compared to express references to wages as a proper bargaining subject under, *e.g.*, the NLRA, is no reason to conclude that compensation is not a "condition of employment" under Section 7103(a)(14). As discussed

2. The principle applied here by the Authority, that a bargaining proposal concerning compensation is negotiable if compensation is not specifically provided for by statute and the proposal is not inconsistent with applicable law or rule, has been followed since the outset of the federal sector labor relations program.[13] The scope of bargainable subjects has

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at pp. 27-30, *infra*, Congress manifestly wanted to render pay nonnegotiable under the Statute for the vast majority of federal employees by continuing to set pay rates by law. Given this clear intent, it would have made little sense for Congress to specify pay as a bargainable matter in the substantive definition of "conditions of employment," and then except pay from that definition in Section 7103(a)(14)(C). This does not change the fact, however, that for those employees whose pay is not set by law, pay is a "condition of employment." Congress' express reference to pay in other bargaining laws is merely a product of the different groups of employees covered under those other laws and differing congressional purposes in delineating those employees' scope of bargaining.

[13] The Report accompanying Executive Order 10,988 indicated that "[a]s a general rule * * * it may be said that a negotiable matter must be within administrative discretion, that is, it must be within the authority of the manager who is negotiating, and permissible by applicable laws, executive orders, and Administration and agency policy." The task force that prepared the Report expressly noted that pay was among the personnel matters within the permissible scope of bargaining to the extent that such matters were within an employer agency's discretion. In this connection, the Report stated that "[s]pecific areas that might be included among subjects for * * * collective negotiations include the work environment, * * * and where permitted by law the implementation of policies relative to rates of pay * * *." 3 C.F.R. 521 (1959-1963 Comp.), *reprinted in* Subcommittee on Postal Personnel and Modernization of the House Committee on Post Office and Civil Service, 96th Cong., 1st Sess. ***Legislative History of the Federal Service Labor-Management Relations***

been defined in terms similar to Section 7103(a)(14) of the Statute since Executive Order 10,988. That Executive Order described the subjects within the scope of its bargaining obligation as "personnel policy and practice, and matters affecting working conditions." 3 C.F.R. 521 (1959-1963 Comp.).[14] Executive Order 11,491 established "personnel policies and practices and matters affecting working conditions" as the subjects within the scope of the parties' bargaining obligation. Exec. Order 11,491, Section 11(a), 3 C.F.R. 867 (1966-1970 Comp.).

The Authority's predecessor, the Federal Labor Relations Council (FLRC), which administered Executive Order 11,491, as amended, found that federal employees whose wages and fringe benefits were not specifically established by law could bargain over those wages and benefits if a proposal was not otherwise inconsistent with law or appropriate regulation. *Overseas Education Ass'n., Inc. and Dep't of Defense, Office of Dependents Schools*, 6 F.L.R.C. 231 (1978) (salary schedules, extra pay lanes and compensation for summer school teachers within the bargaining obligation); *United Fed'n of College Teachers, Local 1460 and United States Merchant Marine Academy,*

Statute, Title VII of the Civil Service Reform Act of 1978 at 1201 (Comm. Print No. 96-7) (*Leg. Hist.*).

[14] Contrary to the Schools' assertion (Pet. Br. 24 n.12), the Executive Orders did use the phrase "conditions of employment." In Executive Order 11,491 the findings state that the well-being of employees and efficient government administration are benefited by giving employees an opportunity to participate in formulating and implementing "personnel policies and practices affecting the conditions of their employment." Exec. Order 11,491, 3 C.F.R. 867 (1966-1970 Comp.). Executive Order 10,988 contains a similarly worded finding. Exec. Order 10,988, 3 C.F.R. 521 (1959-1963 Comp.).

1 F.L.R.C. 211, 212 (1972) (proposals concerning compensation for college faculty negotiable).

The court below properly weighed these FLRC decisions and gave due consideration to Section 7135(b) of the Statute.[15] As the court of appeals noted (Pet. App. 12a), Congress is properly held to have known of these FLRC decisions.[16] *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) (when Congress adopts a new law incorporating sections of a prior law Congress is presumed to know the judicial and administrative interpretations given the prior law). At no point in debate on the Statute did Congress express disapproval of the FLRC's pay decisions. Thus, under Section 7135(b) Congress is properly held to have approved FLRC practice in this area for use under the Statute until changed by law or Authority decision.[17] *Bureau of Alcohol, Tobacco and Firearms*

[15] Section 7135(b) of the Statute provides that all policies and decisions issued under Executive Order 11,491 and its subsequent amendments are to continue in effect unless superseded by Congress or subsequent Authority decisions.

[16] Contrary to the Schools' speculation (Pet. Br. 25), while Congress did not specifically reference these particular FLRC cases in the legislative history of the Statute, Congress demonstrated a thorough knowledge of existing FLRC precedent in its discussions on the Statute. See, *e.g.*, 124 Cong. Rec. 29,187 (1978), *Leg. Hist.* 932-933 (Congressman Clay's references to various FLRC cases). This knowledge fully comports with the inclusion of a provision such as Section 7135(b).

[17] It would be incongruous to conclude, as the Schools urge in effect, that Congress intended to shrink the bargaining obligation under the Statute over what it had been under Executive Order 11,491. To the contrary, Congress generally intended the bargaining obligation under the Statute to be construed more broadly than it had been under the Order. *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1285-86 (D.C. Cir. 1983).

v. *FLRA*, 464 U.S. at 103 n.13 (Executive Order policies concerning agency payment of travel and per diem expenses for union negotiators to continue under the Statute in the absence of indication in the Statute of congressional intent to change those policies).

3. The Authority's analysis of the Statute's legislative history as to pay bargaining, endorsed by the court below (Pet. App. 9a-12a), finds specific expression in the Statute's language and should therefore be adopted. That is, legislators' statements that pay bargaining would not be permitted under the Statute are properly understood as relating to Congress' intent in Section 7103(a)(14)(C) to "specifically provide[] for" pay by law for most federal employees while allowing bargaining over those matters within an agency's discretion. The Schools' view of the legislative history (Pet. Br. 20-22), that Congress intended to make pay a nonbargainable subject *per se*, finds no expression in the Statute's language and should be rejected as the inferior view.

Prior to congressional consideration of the bill which became the Statute, H.R. 11,280, 95th Cong., 2d Sess. (1978), a federal employee collective bargaining bill enumerating a variety of specific bargaining subjects, including pay practices, for all federal employees was introduced but not passed. H.R. 9094, 95th Cong., 1st Sess., *Leg. Hist.* 244. During consideration of H.R. 11,280 this portion of H.R. 9094 was reintroduced by Congressman Heftel but not adopted by the House Committee considering H.R. 11,280. Amendments to Committee Print, dated July 12, 1978 of Proposed New Title VII of H.R. 11,280, *Leg. Hist.* 1087-1088.[18]

[18] Rejection of these proposals does not signify congressional intent to make pay matters *per se* nonnegotiable, as the Schools claim (Pet. Br. 20-21). Many of the other matters

In contrast to H.R. 9094, the version of H.R. 11,280 eventually passed by the Congress contained a broad, generic definition of conditions of employment, and barred wage bargaining for most federal employees through incorporation of the proviso that matters "specifically provided for by Federal statute" were removed from conditions of employment. 5 U.S.C. 7103(a)(14)(C). It was clearly understood by the legislators that a major purpose of what is now Section 7103(a)(14)(C) was to bar wage bargaining for the overwhelming majority of federal employees.[19]

The comments from legislators (cited at Pet. Br. 20-22) that wages are not negotiable indicate that legislators "merely were assuring their peers that the [Statute] would not supplant specific laws which set wages and benefits" (Pet. App. 12a). On a number of occasions during debate on the Statute, key legislators indicated their understanding that pay would not be negotiable under the Statute because Congress would continue to set compensation matters for most employees through legislation.[20]

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listed in these rejected proposals, such as promotion procedures and safety matters, undeniably pertain to conditions of employment that are negotiable under the Statute. Accordingly, it cannot be asserted that rejection of H.R. 9094 signifies congressional intent to render these other matters nonnegotiable.

[19] 124 Cong. Rec. 29,174 (1978), *Leg. Hist.* 906 (statement of Rep. Collins) ("[t]he House committee bill * * * broadly defines scope of bargaining by saying that 'conditions of employment' excludes only matter relating to * * * those few specifically prescribed by law—for example, pay and benefits.").

[20] 124 Cong. Rec. 25,721 (1978), *Leg. Hist.* 855-56 (statement of Rep. Ford) ("no matters that are governed by statute (such as pay, money-related fringe benefits, retirement, and so forth) could be altered by negotiated agreement."); 124 Cong. Rec. 29,182 (1978), *Leg. Hist.* 923 (statement of Rep. Udall) ("All these major regulations about wages * * * will continue to be established by law through congressional action."); 124 Cong. Rec. 24,286 (1978), *Leg. Hist.* 839 (statement of Rep. Clay) ("* * * employees could bargain over everything except that which is prohibited by law—pay, money-related fringe benefits * * *."). See also, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12, 44, *Leg. Hist.* 682, 690.

However, the legislative history also indicates that Section 7103(a)(14)(C) was not intended to exclude from the definition of "conditions of employment" those subjects, such as compensation in this case, which Congress has *not* prescribed by law. Congressmen Clay and Ford, both key figures in enactment of the Statute, stated in floor debate that Section 7103(a)(14)(C) of the Statute would remove only matters "specifically" provided for by statute so that where, as in the instant case, the agency has discretion over a matter, Section 7103(a)(14)(C) would not preclude bargaining.[21]

If Congress really intended, as the Schools claim, to make pay *per se* a nonnegotiable subject, it is most curious that Congress inserted no language in the law itself to that effect. Instead Congress expressly stated

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[21] 124 Cong. Rec. 29,187 (1978), *Leg. Hist.* 933 (statement of Rep. Clay) ("where a statute merely vests authority over a particular subject with an agency official with the official given discretion in exercising that authority, the particular subject is not excluded by [Section 7103(a)(14)(C)] from the duty to bargain over conditions of employment."); 124 Cong. Rec. 29,119 (1978), *Leg. Hist.* 957 (statement of Rep. Ford) ("where a statute merely provides particular authority for an agency official (with that authority to be exercised at the official's discretion and in such manner as the official deems appropriate), that authority and its exercise are not included within the definition in section 7103(a)(14)[(C)] because it is not 'specifically provided for by Federal statute.'").

in relevant part that only those matters "specifically provided for by Federal statute" are outside the definition of conditions of employment. Congress' decision in the instant case to leave employee pay and benefits to the Schools' discretion thus supports the conclusion that it did not intend to withdraw the subject from bargaining under Section 7103(a)(14).

II. THE SCHOOLS HAVE NOT ESTABLISHED THAT THE UNION'S PROPOSALS VIOLATE MANAGEMENT'S RIGHT TO DETERMINE ITS BUDGET UNDER SECTION 7106(a)(1) OF THE STATUTE

Management's right to determine its budget under Section 7106(a)(1) of the Statute is undefined in the Statute and is not described in the Statute's legislative history. Accordingly, early on in its administration of the Statute the Authority devised a two-part test for determining whether a bargaining proposal interferes with this management right. *American Fed'n of Gov't Employees and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 F.L.R.A. 604 (1980) (*Wright-Patterson*), enf'd as to other matters *sub nom. Dep't of Defense* v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).[22]

For the first part of its budget test the Authority focused on the common or dictionary meaning of the term "budget," *i.e.*, a statement of the financial position of a body for a definite period of time based on

[22] In addition to the Second Circuit (see *West Point, supra*) and the court below, the D.C. Circuit has enforced Authority decisions applying this test. See, *e.g.*, *American Fed'n of Gov't Employees, Local 32 and Office of Personnel Management*, 22 F.L.R.A. 307 (1986), enforced *sub nom. OPM* v. *FLRA*, 829 F.2d 191 (1987). But see *Nuclear Regulatory Comm'n* v. *FLRA*, 879 F.2d 1225 (4th Cir. 1989), petitions for cert. pending, Nos. 89-198, 89-562.

detailed estimates of planned or expected expenditures during the period and proposals for financing them. 2 F.L.R.A. at 608. From this dictionary definition the Authority held that a proposal interferes with the budget right under Section 7106(a)(1) of the Statute if it attempts to prescribe a particular program or operation the agency would include in its budget, or the amount of money to be allocated in the budget for such program or operation. *Ibid.*

The Authority recognized, however, that bargaining proposals which on their face did not attempt to prescribe agency programs or dollar amounts to fund those programs could nonetheless interfere with management's budget right by entailing such substantial costs as to alter agency decisions concerning programs and their funding. Thus, the Authority devised the second part of its budget test. Under this second part an agency employer that makes a substantial showing that a proposal entails a significant and unavoidable cost that is not offset by compensating benefits can assert the budget right as a bar to negotiation on the proposal. 2 F.L.R.A. at 608. The Authority specified examples of such compensating benefits as improved employee performance, increased productivity, reduced turnover, and fewer grievances. *Ibid.*[23]

The Authority's approach under *Wright-Patterson* to implementing management's budget right, which approach recognizes both direct and indirect union efforts to become involved in the budget process, is

[23] The Schools do not argue to this Court that the union's proposals at issue here are nonnegotiable because the proposals fall under the first part of the *Wright-Patterson* test. Rather, the Schools' argument on the budget right (Pet. Br. 27-31) focuses exclusively on the second part of the test, concerning real cost impact of the proposals.

balanced and comprehensive. The test is thus a reasonable accommodation of conflicting policies under the Statute (*i.e.*, according proper scope to the collective bargaining process while preserving unilateral management action in designated areas), which test should not be disturbed because there is no indication that it is contrary to congressional will in enacting the Statute. *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Moreover, the Authority's *Wright-Patterson* test and its application in this case are entitled to deference from this Court because the test and its application constitute the Authority's exercise of "its 'special function of applying the general provisions of [the Statute] to the complexities' of federal labor relations." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983) (citation omitted); see also *West Point*, 855 F.2d at 944.

The Authority in this case made two holdings, affirmed by the court of appeals (Pet. App. 20a), concerning application of the second part of the *Wright-Patterson* budget test: first, that Fort Stewart Schools failed to establish a significant and unavoidable cost increase to the Schools caused by the proposals (Pet. App. 37a) [24]; and second, that the

[24] The only evidence submitted to the Authority by the Schools concerning significant and unavoidable cost increases caused by the proposals was that the seven other dependents schools with bargaining units, aside from Fort Stewart Schools, have more than 600 bargaining unit employees with total payroll costs of more than $11 million (Pet. App. 37a). The Schools claimed that if bargaining was permitted in this case, all other dependents schools bargaining units would want to bargain on these matters, thus occasioning substantial cost increases to the dependents schools as a whole. The Authority rejected this assertion (*ibid.*) because it did not pertain to costs engendered by the subject proposals in the bargaining unit here at issue. See, *e.g.*, *International Ass'n of Firefighters, Local F-61 and Philadelphia Naval Shipyard*, 3 F.L.R.A. 438, 452 (1980) (significance of cost of proposal covering 50 employees in a bargaining unit cannot be assessed on the premise that the proposal would apply to 10,000 employees of the agency similarly situated). The Schools do not renew this argument to the Court.

Schools failed to make any showing whatsoever that the proposals' costs, whatever they may be, were not offset by compensating benefits (Pet. App. 37a-38a). The record in this case fully supports these Authority holdings, and the Schools do not argue to the Court that they presented data to the Authority to support a different conclusion. Rather, the Schools assert (Pet. Br. 27-31) that the proposals, particularly Proposal 2 concerning a 13.5% pay increase for School employees (Pet. App. 34a), on their face indicate a significant cost increase to the Schools; and that the portion of the second part of the Authority's *Wright-Patterson* budget test concerning compensating benefits of a proposal offsetting cost is contrary to the Statute. The Schools' claims must be rejected, however, because the Authority's holdings as to the budget right are reasonable under the Statute and supported by the record before it.

1. Congress in the Statute assigned the Authority the task of resolving negotiability disputes in the federal sector. 5 U.S.C. 7105(a)(2)(E), 7117(c); see also, *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 93. In carrying out this responsibility the Authority must balance the Statute's competing interests of ensuring the proper scope of federal sector collective bargaining while allowing agency management to operate efficiently. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 92; *Li-*

brary of Congress v. *FLRA*, 699 F.2d 1280, 1283 (D.C. Cir. 1983). As part of the Statute's negotiability dispute resolution process, the Authority properly requires agency management to support claims of nonnegotiability of a proposal with sufficient data to enable the Authority to adjudicate the claim. 5 U.S.C. 7117(c)(3)(B); *National Fed'n of Federal Employees, Local 1167* v. *FLRA*, 681 F.2d 886, 891 (D.C. Cir. 1982). Cf. *Royal Coach Lines, Inc.* v. *NLRB*, 838 F.2d 47 (2d Cir. 1988) (employer asserting no bargaining obligation with union has burden of producing evidence in support of that claim).

The agency's failure in this case to support its claim to the Authority of significant and unavoidable cost of the union's proposals is manifest. At no point has Fort Stewart Schools articulated the number of employees affected by the proposals; the current payroll costs of unit employees; the dollar amount of the cost increases anticipated by the proposals; total costs for operating the Schools; or any other data which would enable the Authority to assess the real cost impact of the proposals. Moreover, the agency has given no reason for failing to provide the data, even though it is presumably well situated to compile it. In the face of such a studied refusal to present relevant cost data, the Authority properly rejects an agency employer's claim of nonnegotiability based on the budget right. To hold otherwise would cause curtailment of the Statute's bargaining obligation without any clear basis.

The Schools' conclusory assertion (Pet. Br. 28-30), that a proposed 13.5% pay increase on its face is sufficient to establish a "significant and unavoidable" cost increase rising to the level of interference with the budget right under *Wright-Patterson*, falls short of the mark. First, the claim provides no basis for

concluding the proposals' costs are "significant." The union's proposals can only apply to bargaining unit personnel. Thus, school management and other categories of employees excluded from the bargaining unit (see 5 U.S.C. 7112(b)) would not be covered by the proposals. However, the Schools have provided no data as to the percentage of total staff in the bargaining unit. As a result, it is impossible to know the true impact of the proposals on the overall school budget. Also, while total school payroll may be a major component of overall school operating costs, there are obviously other substantial cost factors such as equipment and overhead. See W. Sparkman and B. Walker, *Education Reform and Changing Compensation Practices*, 14 Journal of Education Finance 76, 87 (1988) (teacher pay constituted approximately 58% of overall school budgets surveyed during the period 1979 to 1986). Again, however, the agency left the Authority in the dark as to this data. In sum, the Schools have provided no basis in the record of this case to conclude that the union's proposals will engender a significant cost increase.

Second, even assuming the proposals could be said to cause a significant cost increase, the Schools have provided no basis for concluding that the increase is unavoidable under *Wright-Patterson*. For example, any cost increases caused by the proposals may be avoided by cost savings in other areas, such as non-unit employee pay or equipment expenditures.[25] Again, the Schools' recalcitrance in addressing these issues made it impossible for the Authority to deter-

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[25] Presumably it is just this kind of balancing of costs that is undertaken by local schools in the 27 states where school employees can negotiate on pay. N. Davis, *Scope of Collective Bargaining in Public Education*, 36 Journal of Urban and Contemporary Law 107, 108 (1989).

mine whether the proposals actually require unavoidable costs. Having failed to make its case to the Authority concerning the proposals' significant and unavoidable costs, the Schools' argument was properly rejected by the Authority, as the court below recognized (Pet. App. 20a).

Finally, the Schools' claim (Pet. Br. 29-30), that the court below erred in assessing the proposals' costs against the budget for the Department of the Army as a whole, misapprehends the court's decision. The court of appeals affirmed (Pet. App. 20a) the Authority's rejection of the Schools' bald assertion that the proposals would cause significant and unavoidable costs. The Authority in its decision did not refer to the proposals' cost in relation to the overall Army budget.[26] The court of appeals' reference to the overall Army budget, which reference was prompted by a statement by the Schools to the court, was in addition to the court's basic holding affirming the Authority (Pet. App. 20a). Accordingly, the court of appeals ruling is correct and should be affirmed even in the absence of its reference to the Army's overall budget.[27]

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[26] In another case involving a dependents school's reliance on the budget right, the Authority assessed the significance of a proposal's cost in relation to the school's budget, as the Schools here claim is appropriate (Pet. Br. 29). *AFGE, Local 1770 and U.S. Dep't of Defense Dependent Schools, Ft. Bragg, North Carolina*, 25 F.L.R.A. 1132, 1137 (1987), petition for review dismissed as moot *sub nom. U.S. Dep't of Defense Dependent Schools, Ft. Bragg, North Carolina* v. *FLRA*, 838 F.2d 129 (4th Cir. 1988). See also *National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District*, 3 F.L.R.A. 747 (1980).

[27] The court of appeals' observation concerning the Army's budget is in any event consistent with the realities of the budget process for Section 6 dependents schools. Requested funds for these schools are included in a Department of Defense budget line in the President's annual budget request to the Congress which consists of expenses required for the operation and maintenance of all Department of Defense agencies other than the military departments. Budget of the United States Government, 1990-Appendix, 262-263 (1989). In the proposed 1990 budget, this item totaled over $7.6 billion of which approximately $1.1 billion was allocated to Department of Defense Schools (including overseas schools as well as Section 6 schools such as those at Fort Stewart). *Ibid.* Congress appropriates funds for the Schools as part of the line item in the Department of Defense Appropriations Act which include the same agencies as in that part of the President's budget request discussed above. See Department of Defense Appropriations Act, 1989, Title II, Operations and Maintenance, Defense Agencies, Pub. L. 100-463, 102 Stat. 2270, 2270-4 (1988). Congress appropriated $7.8 billion for these agencies for Fiscal Year 1990. Department of Defense Appropriations Act, 1990, Title II, Operations and Maintenance, Defense Agencies, Pub. L. 101-135 (Nov. 21, 1989). Thus, it is reasonable to conclude, as the court of appeals did, that the agency "budget" referenced in Section 7106(a)(1) of the Statute includes far more than merely the costs of operating the Fort Stewart Schools.

Securities and Exchange Comm'n v. *Chenery Corp.*, 318 U.S. 80, 88 (1943).

2. The "compensating benefits" portion of the Authority's budget test is a reasonable application of the budget right. Management's determination of its budget is, of course, functionally distinct from management's determination to incur costs, as even the Schools recognize (Pet. Br. 28). The former determination is protected from bargaining by a management right under the Statute while the latter determination is not. Thus, in devising a test for deciding when a bargaining proposal is so costly as to compel agency budget decisions, the Authority is properly mindful of the proposal's real cost impact on agency operations after compensating benefits are factored in. For it is only a proposal's real cost impact that

would affect agency budget decisions. To focus solely on a proposal's initial cost would essentially fabricate a management right under the Statute (*i.e.*, the right to determine what costs will be incurred by the agency) where none otherwise exists. Such a result is obviously to be avoided. *AFGE, Local 32* v. *FLRA*, 853 F.2d 986, 992 (D.C. Cir. 1988).

Moreover, and contrary to the Schools' claim (Pet. Br. 30), the "compensating benefits" showing an agency must make under the Authority's test to support an assertion of the budget right is reasonably placed on the agency employer. The cost/benefit analysis called for is a commonly used management planning device in both the private and public sectors. See, *e.g.*, Exec. Order 12,291, 3 C.F.R. 127 (1982) (federal agencies must perform cost/benefit analysis, including non-quantifiable costs and benefits, in determining whether to issue a major rule); P. Butler, *Employer-Sponsored Recreational Activities: Do the Costs Outweigh the Benefits?*, 39 Labor Law Journal 120 (1988). No reason appears why the Schools could not provide the Authority with analysis as to the benefits, if any, of the union's proposals in terms of higher employee productivity, reduced turnover, etc. The Schools' total failure even to attempt such a showing is sufficient reason for the Authority to have rejected its claim.[28]

The Authority acts consistently with the Statute in making a determination whether a proposal's initial cost is offset by compensating benefits. First, Con-

[28] The Schools are not alone in refusing to provide the Authority with data concerning compensating benefits of a proposal in connection with assertion of the budget right. In fact, no agency has ever provided the Authority with such data in a budget right case. Accordingly, the Authority has not issued a decision implementing the compensating benefits aspect of its budget test.

gress has appointed the Authority as the arbiter of which proposals interfere with management rights (see pp. 33-34, *supra*). To propose, as do the Schools (Pet. Br. 30-31), that the Authority is to accept without question an agency employer's assertion that a proposal's initial cost is not sufficiently compensated for by the proposal's benefits is to make the Authority a mere "rubber stamp" for agency assertions of nonnegotiability in the budget area. Congress clearly did not have this role in mind for the Authority under the Statute. For the Statute to work properly the Authority must retain its ability to make independent assessments of which proposals are so costly in real terms as to effectively interfere with the budget right. 124 Cong. Rec. 29,187 (1978), *Leg. Hist.* 933 (remarks of Congressman Clay that a key element of agreement on the management rights clause of Section 7106 of the Statute is the Authority's "conscientious scrutiny" of management claims of infringement on those rights).

Second, compensating benefits analysis does not inject the Authority into an agency employer's decision making process that is protected by management's budget right under the Statute. The essence of the budget right, as the Authority recognized in *Wright-Patterson*, 2 F.L.R.A. at 608, is to determine what programs the agency will conduct, and how much money it will spend in conducting those programs. *Webster's Third New International Dictionary* 290 (1986) (budget defined as "a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the period and proposals for financing them"). If a union proposal concerns a condition of employment and does not have the effect of increasing the amount of money an agency needs to

request from Congress to conduct its operations, the budget right does not bar negotiations on the proposal.

Thus, the Schools are incorrect in arguing (Pet. Br. 31) that the budget right enables management to decide, for example, to pay employees low wages and suffer high turnover costs and low productivity, even though a union proposal for higher wages would result in no real cost impact to agency operations because the proposal reduces turnover and increases productivity. The Statute allows employees to seek to improve their work lives through collective bargaining in such a situation. In short, the Authority's compensating benefits analysis is designed to do nothing more than allow bargaining to take place where the agency cannot show that the proposal would disturb an agency's budget decision to the most cost effective way of doing business. As such, compensating benefits analysis is a reasonable application of the Statute which should be affirmed. Moreover, the Schools manifestly failed to sustain their burden under the test, as the court of appeals correctly recognized.

III. THE SCHOOLS HAVE NOT ESTABLISHED THAT A "COMPELLING NEED" EXISTS FOR AN ARMY REGULATION, AND THE REGULATION THEREFORE CANNOT BAR BARGAINING ON THE INSTANT PROPOSALS

1. Employer agencies may not assert their own internal regulations as bars to bargaining unless the regulations are supported by a "compelling need." 5 U.S.C. 7117(a)(2); 5 C.F.R. 2424.11. The compelling need requirement originated in an amendment to Executive Order 11,491 due to agency employers unduly restricting the scope of bargaining under the Order through regulation issuance. Exec. Order No. 11,838, 3 C.F.R. 957 (1971-1975 Comp.). In Section

7117(a)(2) of the Statute the Authority is charged with prescribing regulations to be used in determining whether a compelling need exists for agency regulations. Congress directed the Authority in Section 7117(b)(1) with making particular determinations as to whether a compelling need exists for an agency's regulation so as to bar negotiation over inconsistent proposals.[29]

An administrative agency such as the Authority, when interpreting its regulations which explicitly implement policies established by Congress or the executive, is entitled to even greater deference than it is in interpreting a statute. *Federal Deposit Insurance Corp.* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The Authority's interpretation and application of its own regulations is to be set aside only if it is plainly erroneous or inconsistent with its regulation. *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980).

Under the direction of Section 7117(a)(2) the Authority has formulated three criteria in its regulations

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[29] An agency regulation is, as the name connotes, one issued by an executive agency to govern the conduct of affairs within that agency. It is to be contrasted with a government-wide regulation, as referenced in Section 7117(a)(1), (2) of the Statute, which is applicable to the federal civilian work force generally, and is usually issued by agencies such as the Office of Personnel Management or General Services Administration. *See National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District*, 3 F.L.R.A. 747, 754 (1980). All government-wide regulations are a bar to bargaining over matters which would bring about an inconsistency with those regulations. The only agency regulations which act as a bar to bargaining are those for which the Authority finds a compelling need. 5 U.S.C. 7117(a)(1), (2).

to determine whether an agency's regulation will bar bargaining. The criterion here at issue is whether a regulation implements an "essentially nondiscretionary" mandate of "law or other outside authority."[20] 5 C.F.R. 2424.11(c). The burden of demonstrating a compelling need rests with the employing agency. 5 C.F.R. 2424.11. The agency must produce the necessary facts and arguments to support its compelling need claim, as the Authority is not in a position on its own to determine the purposes the regulations are designed to achieve or their importance to the agency. *AFGE, Local 3804 and Federal Deposit Insurance Corporation, Madison Region*, 21 F.L.R.A. 870, 881 (1986).

2. In this case the Army has not proven that its regulation, AR 352-3, § 1-7, implements in a nondiscretionary manner a mandate of Section 241. The language of Section 241 does not mandate specific salaries for Section 6 teachers and school employees, nor does it render the setting of salaries nondiscretionary.

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[20] The Schools attack this criterion (Pet. Br. 33 n.23), the sole basis for their compelling need argument, as redundant with Section 7117(a)(1) of the Statute (proposals inconsistent with law or government-wide rule nonnegotiable). The claim is without merit because an authority other than a statute can contain the mandate a regulation must implement. *NFFE, Local 1669* v. *FLRA*, 745 F.2d 705, 708 (D.C. Cir. 1984) (conference committee report on appropriations bill can contain mandate under 5 C.F.R. 2424.11(c)). Further, a compelling need criterion that creates parity between laws and implementing agency regulations as negotiability bars is hardly error. Finally, the Schools' assertion that the criterion under 5 C.F.R. 2424.11(c) is the only basis for finding a compelling need, is erroneous. Another criterion, not relied on here by the Schools, is whether a regulation is essential to an agency's accomplishment of its mission. 5 C.F.R. 2424.11(a).

In determining the scope of a statute this Court has recognized the language must be examined first. *United States* v. *Monsanto*, 109 S. Ct. 2657, 2662 (1989); *Immigration and Naturalization Service* v. *Hector*, 479 U.S. 85, 88 (1986); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

As the court below recognized (Pet. App. 14a), "Section 241 as a whole demonstrates that the Army has wide discretion to set these employees' salaries." Congress in Section 241 has not established specific wage and salary scales for dependents schools employees. Section 241(a), which AR 352-3, § 1-7 is designed to implement, provides in relevant part that Section 6 schools "[t]o the maximum extent practicable" shall ensure that the education they provide be "comparable to free public education provided for children in comparable communities in the State" where the Section 6 school is located." Section 241(e) provides in relevant part that "to the maximum extent practicable," per pupil costs in Section 6 schools will not exceed per pupil costs for free public education for children in comparable communities in the state.

Taking both of these statutory provisions together (even though AR 352-3, § 1-7 purports to implement only Section 241(a)), they require the schools as best they can to provide federal dependents with comparable education to local schools at the same cost as local schools. These provisions of Section 241 do not, however, mandate how the various Section 6 schools

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[21] A law that says that an agency shall do something "to the maximum extent practicable" can hardly be said to issue a mandate as required under 5 C.F.R. 2424.11(c), as the court of appeals correctly noted (Pet. App. 19a).

are to reach these end results. Rather, Section 241 allows the schools discretion in how to reach these goals.[32]

For example, nothing in Section 241 bars a Section 6 school from deciding to invest more heavily than local schools in computers as a learning tool, while scaling back on staff size and pay. Conversely, a Section 6 school could elect under Section 241 to put more resources into staff than do local schools, while de-emphasizing equipment. In either case, so long as education quality and per pupil cost are as nearly as possible the same, Section 241 requirements are satisfied.[33]

The conclusion that a comparable education does not require salary identity is buttressed by the language in the rest of Section 241. The third sentence

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[32] The Schools admit (Pet. Br. 33 n.22) that not all factors in AR 352-3, § 1-7 must be set by comparison to local schools. Yet the Schools provide no basis for distinguishing between which factors in the regulation must be set by local school comparison and which may not, even though most of the factors would affect overall per pupil cost. Accordingly, the Schools' concession undermines the claim that the regulation is a required implementation of Section 241.

[33] The Schools argue (Pet. Br. 33) that Congress recognized in Section 241(a) a link between school employee compensation and education comparability when it said that school employee compensation could be set without regard to various federal pay and benefit laws. The point does not advance the Schools' case. The primary reason for Congress' freeing Section 6 schools from these laws was because of the laws' unsuitability for the peculiarities of school administration (*e.g.*, a nine or 10 month work year for school employees compared to a 12 month work year for most federal employees). S. Rep. 311, 89th Cong., 1st Sess. 4, *reprinted in* 1965 U.S. Code Cong. & Ad. News 1910, 1913. This basis for the Schools' exemption from federal pay and benefits laws hardly supports a conclusion that dependents school employee pay must be identical to that of local school employees.

of Section 241(a) requires dependents schools outside the continental United States, Alaska, and Hawaii to provide a "comparable education" to free public schools in the District of Columbia. 20 U.S.C. 241(a). However, Congress added a sentence to Section 241(a) in 1978 which required that:

> Personnel provided for under this subsection outside of the continental United States, Alaska, and Hawaii, shall receive such compensation, tenure, leave, hours of work and other incidents of employment on the same basis as provided for similar positions in the public schools in the District of Columbia.

20 U.S.C. 241(a). The language of this amendment clearly leaves no room for the way in which these territorial schools' salary and leave matters are set. To interpret "comparable education" to include identical salaries, as suggested by the Army (Pet. Br. 34), would make the additional sentence in 241(a) concerning territorial schools redundant.[34] It is an established axiom of statutory interpretation that statutes

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[34] The legislative history of the 1978 amendment unequivocally shows, contrary to the Army's argument (Pet. Br. 35), there would have been no need for this provision if the term "comparable education" meant identical salaries. The legislative history indicates that representatives of the Antilles Consolidated Teachers Association pointed out that prior to amendment Section 6 "invites abuse by *not specifying personnel practices, especially regarding salary.* * * * As a consequence of this testimony, the Committee has adopted an amendment making clear that the compensation, tenure, leave, hours of work, and other incidents of employment for personnel in school systems located outside of the 50 States must be on the same basis as that provided in the public schools of the District of Columbia." H.R. Rep. No. 1137, 95th Cong., 2d Sess. 108, *reprinted in* 1978 U.S. Code Cong. & Admin. News 4971, 5078 (emphasis provided).

should not be construed to make words meaningless or surplusage where Congress expressly included the words. *United States* v. *Menasche*, 348 U.S. at 538-539 (1955).

3. The Army argues (Pet. Br. 34-35) that since non-wage expenditures account for only a small percentage of any school budget, the court of appeals' conclusion that the Army can still provide a comparable education at a comparable cost per pupil despite variations in teacher pay must be wrong. This argument ignores the fact that, as shown at p. 35, *supra*, salaries and wages accounted for about 58% of the surveyed public schools' total expenditures. Similarly, the Department of Defense budget submission to the Office of Management and Budget shows that compensation for all Defense dependents schools, foreign and domestic, was only about 50% of total schools expenditures for fiscal year 1988 ($469 million out of a total budget of $943 million). Department of Defense, *Budget Justification, Fiscal Year 1990*, Operation and Maintenance, Defense Agencies 210. Certainly, these percentages do not suggest that a school system does not have room for maneuvering in other items of its budget in order to ensure overall per pupil cost equivalency with local schools after increasing pay.

Further, even assuming that other non-wage items such as computers, books, building maintenance, athletic programs, clubs and lunch services account for only a small percentage of the school's budget, the Army still has the flexibility to adjust those factors. In fact, the Army does not indicate how it will be impacted in any way by the monetary increases expected by raising teachers' pay by 13.5%, or for that matter how the union's other proposals concerning

leave would affect those expenditures.[25] The fact that employees may be paid at a higher rate does not mean that the objective under Section 241 to have a comparable education at a comparable per pupil cost cannot be maintained. Improved teacher pay should enhance the quality of that education by attracting more qualified personnel. W. Sparkman and B. Walker, *Education Reform and Changing Compensation Practices*, 14 Journal of Educ. Fin. 76, 87 (Summer 1988).

In sum, AR 352-3, § 1-7 is not required under Section 241, but rather is the Army's own exercise of discretion as to how it chooses to implement that law. Matters of discretion like this are the kinds of things the Statute intended for collective bargaining. *Library of Congress* v. *FLRA*, 699 F.2d at 1289. Accordingly, the Authority and the court below properly held the Army's regulation not to be supported by a compelling need.

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[25] Sections A through G, I and J of proposal 1, which assume that pay rates will be fixed in accordance with pay practices in comparable local school systems, clearly do not conflict with AR 352-3, § 1-7, as the Authority held (Pet. App. 41a). Moreover, Proposal 3, dealing with leave, is unrelated to the salary schedules referenced in § 1-7. Accordingly, even if a compelling need for the Army regulation is found, these proposals are negotiable as not inconsistent with the regulation.

CONCLUSION

The judgment of the court of appeals should be affirmed.[26]

Respectfully submitted.

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DECEMBER 1989

[26] The Acting Solicitor General authorizes the filing of this Brief for the Respondent Federal Labor Relations Authority.

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE AS AMENDED, 5 U.S.C. §§ 7103-7135 (1988); 5 C.F.R. § 2424.11; 20 U.S.C. § 241; AND AR 352-3

§ 7103. Definitions; application

(a) For the purpose of this chapter—

* * * * *

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

* * * * *

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to sus-

pend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

* * * * *

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling

need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

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§ 7135. Continuation of existing laws, recognitions, agreements, and procedures

* * * * *

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.

5 C.F.R. § 2424.11

§ 2424.11 Illustrative criteria.

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of

the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to insure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

20 U.S.C. § 241

§ 241. Education of children where local agencies cannot supply facilities

(a) Necessary arrangements by Secretary; standard of education

In the case of children who reside on Federal property—

(1) if no tax revenues of the State or any political subdivision thereof may be expended for the free public education of such children; or

(2) if it is the judgment of the Secretary, after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children, the Secretary shall make such arrangements (other than arrangements with respect to the acquisition of land, the erection of facilities, interest, or debt service) as may be necessary to provide free public education for such children.

• • • • •

To the maximum extent practicable, the local educational agency, or the head of the Federal department or agency, with which any arrangement is made under this section, shall take such action as may be necessary to ensure that the education provided pur-

suant to such arrangement is comparable to free public education provided for children in comparable communities in the State, or, in the case of education provided under this section outside the continental United States, Alaska, and Hawaii, comparable to free public education provided for children in the District of Columbia. For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed without regard to the Civil Service Act and rules and the following: (1) chapter 51 and subchapter III of chapter 53 of title 5; (2) subchapter I of chapter 63 of title 5; (3) sections 5504, 5541 to 5549, and 6101 of title 5; (4) sections 1302 (b), (c), 2108, 3305(b), 3306(a)(2), 3308 to 3318, 3319(b), 3320, 3351, 3363, 3364, 3501 to 3504, 7511, 7512, and 7701 of title 5; and (5) chapter 43 of title 5. Personnel provided for under this subsection outside of the continental United States, Alaska, and Hawaii, shall receive such compensation, tenure, leave, hours of work, and other incidents of employment on the same basis as provided for similar positions in the public schools of the District of Columbia.

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(e) Limit on payments

To the maximum extent practicable, the Secretary shall limit the total payments made pursuant to any such arrangement for educating children within the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State. The Secretary shall limit the total payments made pursuant to any such arrangement for educating children

outside the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the amount he determines to be necessary to provide education comparable to the free public education provided for children in the District of Columbia.

AR 352-3

1-7. Comparison factors. Education provided pursuant to the provisions of Section 6 for children residing on Federal property will be considered comparable to free public education offered by selected communities of the State when the following factors are, to the maximum extent practicable, equal:

a. Qualifications of professional and nonprofessional personnel.

b. Pupil-teacher ratios.

c. Curriculum for grades offered, including kindergarten and summer school, if applicable.

d. Accreditation by State or other accrediting association.

e. Transportation services (student and support).

f. Length of regular [illegible]/or summer term(s).

g. Types and nu[illegible] of professional and nonprofessional po[illegible]

h. Salary sch[illegible]

i. Conditi[illegible]ployment.

j. Instruct[illegible] equipment and supplies.